

***United States Court of Appeals  
for the Second Circuit***



**APPELLEE'S BRIEF**



ORIGINAL

75-7021

To be argued by  
BARBARA SHORE RESNICOFF

UNITED STATES COURT OF APPEALS  
FOR THE SECOND CIRCUIT

-----X

ROBERT J. FINE, :

Plaintiff-Appellant, :

-against- :

THE CITY OF NEW YORK, FRANK KLEIN, :

MARVYN KORNBERG, ESQ., ALBERT :

GAUDELLI, ESQ., and HERBERT KAHN, ESQ., :

Defendants-Appellees, :

-and- :

PTL. ANTHONY SALADINO, ESTATE OF ROBERT :  
L. RADTKL, DET. MICHAEL SASSAMAN, PTL. :  
"JOHN" STANLEY, PTL. "JOHN" DWYER, PTL. :  
"JOHN" FISCHER, SGT. "JOHN" MURRAY, :  
DAVID FAULKNER and MRS. DOLORES :  
FAULKNER, :

Defendants. :

-----X

BRIEF FOR DEFENDANTS-APPELLEES,  
KAHN AND GAUDELLI



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FAULKNER,	:	
Defendants.	:	
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BRIEF FOR DEFENDANTS-APPELLEES,  
KAHN AND GAUDELLI

Preliminary Statement

Plaintiff-appellant appeals from an order dated November 22, 1974 of the United States District Court for the Southern District of New York, Brieant, J., which granted the motions of defendants Gaudelli and Kahn, among others,



to dismiss the complaint for failure to state a claim, pursuant to Rule 12(b)(6) F.R. Civ. P.

### Questions Presented

1. Whether a state prosecutor, acting in his official capacity to start criminal proceedings, is immune from prosecution under 42 U.S. 1983 for the presentation before a grand jury?

2. Whether a secondary claim may be brought against a person against whom the federal claim has been dismissed?

### Statement of Facts

In March, 1972, David Faulkner, a minor was arrested for attempting to sell a firearm. While being questioned by the police, Faulkner stated that the gun belonged to plaintiff-appellant Robert J. Fine, with whom Faulkner was engaged in a homosexual relationship. Faulkner offered to show policemen Fine's apartment and accompanied them on a warrantless search. The door of the apartment was unlocked. Faulkner offered to cooperate with the police. He again accompanied detectives Ratke and Sassaman to the apartment. Faulkner's lawyer accompanied them on that search. Detective Sassaman returned on another occasion. During the course of these searches, the

policemen seized gambling notations, photographs of nude males and a photograph of David Faulker in the nude (37a).

Subsequently, a uniformed policeman arrested plaintiff in his taxicab. Charges were brought against him in Queens County Supreme Court. Those charges included sodomy, endangering the welfare of a child, possession of gambling records, and possession of weapons. Assistant District Attorney Herbert Kahn presented the evidence to the Grand jury.

Plaintiff made a motion to suppress the evidence seized. After a hearing, Judge Brennan granted that motion on January 17, 1974. The charges were later dismissed.

During the course of these proceedings, plaintiff made allegations of corruption. Assistant District Attorney Gaudelli was assigned to investigate the allegations. He was presenting evidence to the Grand Jury, when he was superceded by the Special Prosecutor's office under Maurice Nadjari.

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\* Numbers in parenthesis refers to pages in the appendix.



Plaintiff claims that he still has not received the property taken at the time of the search. He filed a replevin action in the state court. He also filed this civil rights complaint pursuant to 42 U.S.C. § 1983. In his complaint he claims that defendants Gaudelli and Kahn, acting in their capacities as assistant district attorneys "presented evidence of a crime to a state grand jury." This evidence was later suppressed as having been obtained as a result of the unlawful search [Paragraphs 17-20 of the complaint, 11a of the Appendix].

A motion to dismiss was made by defendants Gaudelli and Kahn.

#### The Decision of the Court Below

Judge Brieant, in a memorandum and order dated November 22, 1974, dismissed the complaint against defendants Gaudelli and Kahn, Klein, Kornberg and City of New York. In regard to defendants Gaudelli and Kahn (each an Assistant District Attorney), the court held that the act of presenting evidence to a grand jury was within their official responsibility. Therefore, they were immune from a civil rights complaint [Appendix 59a].

Since that decision, plaintiff presented new evidence in the court below under FRCP 60. Judge Briant granted reargument. He adhered to his prior decision, except for granting plaintiff leave to file an amended complaint against defendant Kornberg.

POINT I

PLAINTIFF HAS FAILED TO STATE A CAUSE OF ACTION AGAINST DEFENDANTS GAUDELLI AND KLEIN. THERE IS NO ACT OF THESE DEFENDANTS OTHER THAN PRESENTING TO THE GRAND JURY MATTERS IN ACCORDANCE WITH THEIR DUTIES AS DISTRICT ATTORNEYS

Plaintiff claims that his allegations are adequate. However, the only facts that are alleged in paragraphs 1 through 30 of the complaint and that can be connected to defendant Kahn, is his presenting evidence to the grand jury that was later suppressed. Similarly, the only allegations connected to defendant Gaudelli is his presenting evidence to another grand jury.

There are no facts alleged to support plaintiff's claims that defendants acted maliciously, wrongfully withholding property, or tampering with witnesses. Nor is there any claim in the court below to support his allegation that defendant Gaudelli while "engaging in a vendetta against the plaintiff" turned property over to the police. (Plaintiff's brief, paragraph 9). These



claims are wholly conclusory, and like another case, a "hodge-podge of vague and conclusory allegations. No facts are presented which would be sufficient to support his claims." Powell v. Jarvis, 460 F. 2d 551 (2d Cir. 1972). Without more particularity the complaint is insufficient. Powell v. Workmen's Compensation Board, 327 F. 2d 131, 137 (2d Cir. 1964).\*

Therefore, the only claim that can be considered is that the defendants Kahn and Gaudelli presented evidence to grand juries. Judicial immunity from suits for damages based on acts performed in official capacity is well established. The principle of judicial immunity has been extended to prosecutors, notwithstanding an allegation that pure spite motivated the prosecutor, Yasselli v. Goff, 12 F. 2d 396 (2d Cir. 1926) affd. 275 U.S. 503 (1927) (per curiam) or an allegation that the prosecutors conspired together and maliciously and willfully entered into a scheme to deprive plaintiff of liberty. Gregoire v. Biddle, 177 F. 2d 579 (2d Cir. 1949) cert. den. 339 U.S. 949 (1590).

\* Plaintiff asserts that by not filing an opposing affidavit, defendants Gaudelli and Kahn admit the truth of his allegations. On the contrary, defendants moved to dismiss or a 12(b)6 motion. Since that motion was granted it was unnecessary to file answering papers.

As Judge Learned Hand stated in Gregoire prosecutorial immunity is extended no matter what malicious and spiteful animus motivated the action. Accord Imbler v. Pachtman, 500 F. 2d 1301 (9th Cir. 1974) cert. granted 95 S. Ct. 1324 (1975).

That principle has survived the Civil Rights Act. Pierson v. Ray, 386 U.S. 547 (1967). Prosecutors also have immunity from civil rights complaints when acting in their official capacity. Dacey v. New York County Lawyers Association, 432 F. 2d 188 (2d Cir. 1969) cert. den. 398 U.S. 929 (1970); Fanale v. Sheehy, 385 F. 2d 866 (2d Cir. 1967) (district attorney's participation in prosecution); Fowler v. Vincent, 366 F. Supp. 1224 (S.D.N.Y. 1973); Williams v. Halpern, 360 F. Supp. 554 (S.D.N.Y.); Martin v. Merola, 389 F. Supp. 323 (S.D.N.Y. 1975) (prosecutor alleged to have made prejudicial press release).

As Judge Dooling in the United States District Court for the Eastern District of New York stated in dismissing a civil rights complaint which alleged that the State prosecutor



had wrongfully caused the plaintiff to be indicted on malicious testimony:

"The principle of Gregoire v. Biddle, 2d Cir. 1949, 177 F. 2d 579, quoted extensively in Barr v. Matteo, 1959, 360 U.S. 564, 571-572, requires that the prosecuting attorney and his assistants be immune from suit and not simply free of responsibility in damages only if they prove that they acted honorably. Cf. Scheuer v. Rhodes, 1974, 416 U.S. 94 S. Ct. 1683, 40 L. ed. 2d 90. Inquiry must halt, where as in the present case, the pleading of the plaintiff himself shows that every act that it is charged that the district attorney and his assistants performed improperly was an act which he and they were under a duty to perform as a duty central to their public office responsibilities in their most exactingly discretionary aspects." Fowler v. Marchese, F. Supp. \_\_\_\_\_, 74-C-696 (E.D.N.Y.).

Accord, Sykes v. State of California (Dept. of Motor Vehicles), 497 F. 2d 197 (9th Cir., 1974) (complaint alleged, inter alia that Assistant District Attorney and others conspired to falsely arrest and imprison plaintiff and maliciously prosecute him).

Hahn v. Sargent, 388 F. Supp. 445, 453 (D. Mass. 1975) (complaint alleged that prosecutors should not have presented contradictory evidence to grand jury and (with no factual basis) that prosecutors procured perjured testimony. Yglesias v. Gulf Stream Park Racing Association, 201 F. 2d 817 (5th Cir. 1953) (complaint alleged malicious prosecution); Morritt v. James, 75 C 554, cited by plaintiff, and presently on appeal in this Court, is distinguishable from the case at bar. In Morritt, plaintiff alleged specific grounds (such as withholding exculpatory evidence from grand jury, and tricking plaintiff into signing a waiver) false arrest, which had been held to be civil rights violations in other jurisdictions.\* However, in this case plaintiff presented claims that have been held dismissible in this jurisdiction. Gregoire v. Biddle, supra; Fanale v. Sheehy, supra.

It is clear that defendants had a duty under the Criminal Procedure Act to exercise discretion in determining what cases should be prosecuted.

Although the evidence was suppressed, State Supreme Court Justice William C. Brennan wrote in his opinion that there was "ample cause for investigation. A crime had been committed, a gun was found, an investigation was in order."

\* It should also be noted that plaintiff's claim about defendant Gaudelli's investigation of corruption is similar to the one Morritt brought against District Attorney Gold, and that claim was dismissed.



These words are equally applicable to the determination of presenting a case to the grand jury. A crime had been committed, and the prosecutors had the discretion and duty to determine whether the case should be presented - to claim that mere presentation of evidence is a violation of civil rights would cripple the district attorney's office.

POINT II

THE COURT BELOW DID NOT ERR IN  
REFUSING TO EXERCISE ANCILLARY  
JURISDICTION OVER DEFENDANTS  
GAUDELLI AND KAHN

Plaintiffs has also made ominous claims alleging trespass, conversion, false arrest, malicious prosecution, larceny, invasion of privacy and prima facie tort, and extortion.

It would appear that plaintiff seeks to alleged malicious prosecution against defendants Gaudelli and Kahn. However, as explained previously (supra, p. 5) state attorneys are immune from charges of malicious prosecution. It is clear that the other charges, are a matter of state law and they are independent of the claims concerning the prosecution of the case against plaintiff, and subject to dismissal,

"It is hardly necessary to say that a federal court is without the judicial power to entertain a cause of action not within its jurisdiction, merely because that cause of action has mistakenly been joined in the complaint with another which is within its jurisdiction."  
Hurn v. Oursler, 289 U.S. 238, 248 (1932).

CONCLUSION

THE ORDER OF THE DISTRICT  
COURT SHOULD BE AFFIRMED

Dated: New York, New York  
October 16, 1975

Respectfully submitted,

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STATE OF NEW YORK )  
 : SS.:  
COUNTY OF NEW YORK )

MARY KO , being duly sworn, deposes and says that she is employed in the office of the Attorney General of the State of New York, attorney for Defendants-Appellees herein. On the 16th day of October , 1975 , she served the annexed upon the following named person :

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Attorneys in the within entitled action by depositing a true and correct copy thereof, properly enclosed in a post-paid wrapper, in a post-office box regularly maintained by the Government of the United States at Two World Trade Center, New York, New York 10047, directed to said Attorneys at the address eswithin the State designated by them for that purpose.

Mary Ko

Sworn to before me this  
16th day of October , 1975

Robert Shore Resnick  
Assistant Attorney General  
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